

BHADAIN S. v THE INDEPENDENT COMMISSION AGAINST CORRUPTION

2004 SCJ 182

Record No. 83746

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

SUDARSHAN BHADAIN

Applicant

v.

THE INDEPENDENT COMMISSION AGAINST CORRUPTION (ICAC)

Respondent

In the presence of:

**THE HON. PRIME MINISTER
THE CORRUPTION ADVISORY COMMITTEE**

Co-Respondents

JUDGMENT

This is an application for leave for a Judicial Review of the decision and decision making process of the respondent Commission, a body corporate created by Act of Parliament, interdicting and dismissing the applicant from the post of Director of the Corruption Investigation Division (CID) of the respondent.

By letter dated 3 December 2003, the respondent informed the applicant that he had been interdicted from the exercise of the duties of Director of the CID with immediate effect on the grounds that:

- (a) he was bringing the respondent into disrepute;

- (b) his presence at the respondent's office was prejudicing its smooth running; and
- (c) his conduct was against the interest of the respondent.

The letter stated that he was interdicted pending consideration of the desirability of an enquiry and pursuant to the powers of the respondent under Clause (viii)(b) of the offer of employment made to the applicant on 16 May 2003. According to that clause "*in any case either party may terminate the contract by giving three months notice*" so that it appears that at that stage of the interdiction the respondent was already envisaging the possibility of eventually pursuing that decision with a dismissal.

On 17 December 2003, the applicant lodged the present application which then called for a judicial review of his interdiction. But he was eventually dismissed and his application was, with leave of the Court, amended to challenge that decision as well.

The dismissal was communicated by letter dated 23 December 2003 but the reasons advanced for the dismissal were quite different from the reasons invoked for the interdiction of the applicant.

In the letter of dismissal, emphasis was placed on the applicant's appointment being allegedly on a three-year contract basis, but subject to an initial probationary period of one year which was said to be still subsisting at the time the decision to dismiss him was reached. The reason invoked in the letter for dismissing applicant was that the respondent had reached the conclusion that he was not a suitable person for the post of Director of the CID "*after consideration of all relevant matters, including your performance and aptitude to work within this organization.*"

In his able address, learned Counsel for the applicant laid stress on two points:

- (1) that the letter of 16 May 2003 which mentions a probationary period of one year was not binding on the applicant since he had already accepted the terms and conditions of employment offered to him by letter dated 21 February 2003 to the effect that the duration of the contract was for three years without any qualification or reserve;
- (2) that even if that probationary period was applicable to applicant, the dismissal was *ultra vires* and contrary to law since it did not comply with the procedural requirements of section 24(8) of the Prevention of Corruption Act [POCA].

As regards the first point, a number of surrounding facts were relied upon, viz:

- (i) by letter dated 11 October 2003, the respondent had offered employment to the applicant as Consultant for a period of one year with effect from 1 November 2002. One of the five assignments referred to as “terms of reference”, concerns responsibility for any investigation relating to corruption and money laundering. Terms and conditions of employment relating to salary, leave, gratuity and travelling allowance were also set out in the letter;
- (ii) by letter dated 21 February 2003, before applicant’s term of employment as Consultant had expired, he was offered employment as Director of the CID. Five “*terms and conditions*” were set out in the letter including the one on duration of the contract which was stipulated to be for three years. There was no

other reservation or qualification but paragraph 3 of the letter states that *“the other terms and conditions of appointment will be communicated to you in due course.”* The applicant was requested to inform respondent within a week whether he was accepting the offer;

- (iii) by letter dated 28 February 2003 the applicant replied that he was confirming his acceptance of the post of Director of the CID;
- (iv) on 4 April 2003, the applicant wrote to the Secretary of the respondent asking to be informed of the *“terms and conditions”* of his post, presumably meaning *“the other terms and conditions”* mentioned in the letter of 21 February 2003;
- (v) on 16 May 2003 the applicant received a letter [second letter] signed by the Secretary of the respondent mentioning the *“other terms and conditions of the contract”* in furtherance of the letter of the respondent dated 21 February 2003 [first letter]. There are 7 *“other terms and conditions”* listed in the second letter but on perusal, two of them viz. terms and conditions (i) and (ii), dealing with the duration of the contract and the gratuity payable on satisfactory completion of 12 months service, are not new ones and do not really fall under the *“other terms and conditions”* announced in the first letter. The term dealing with the duration of the contract in the second letter is, however, materially different from the term dealing with the same matter as contained in the first letter since the unqualified and unreserved duration of the contract initially given for a term of three years was being made *“subject to an initial probationary period of one year”*. The second

letter ends with a request that the applicant informs respondent within a week whether he would accept the offer of employment *"on the terms and conditions mentioned in this letter and that of the 21 February 2003."* It is agreed that the applicant did not reply to the second letter but nevertheless availed himself of the benefits under the *"other terms and conditions"* like the use of an official car, travelling allowance, etc., so that the respondent has averred that the applicant must be deemed to have accepted not only the favourable terms but the onerous terms as well.

The applicant has admitted that at the time he filled his application form for the post of Director of the CID he was aware of the contents of the *"Notes & Instructions"* form issued by the respondent which mentions at paragraph 12 that *"the first year of a three year term of agreement is a probationary period ..."*. But he denies that the form was attached to the second letter or was applicable to him. The respondent however claims that the *"Notes & Instructions"* were of general application to all its employees except those recruited from abroad.

With that background of divergent views, the question has been raised as to whether the probationary period mentioned in the second letter, if it could be validly inserted at all, could apply to the applicant in the light of the unqualified offer for a term of 3 years contained in the first letter which had already been accepted since 28 February 2003. We need not pronounce ourselves on the merits at this stage but need only say that sufficient material has been placed before us by the applicant to show that he has a justiciable issue to be tried and to justify our granting to him leave to proceed.

We could have stopped here on the issue of leave but have felt it appropriate to consider also the second point raised by learned Counsel for the applicant on the alleged ***ultra vires*** dismissal for non compliance with the procedural requirements of section 24(8) of the POCA since it has also been made the focal point in the applications lodged by two other officers viz. Messrs Halkharee and Ghoorah, for leave to review the decisions of the respondent in relation to their dismissal.

Now, section 24(1) of the POCA provides that:

“Subject to subsection (2), the Commission shall employ such officers it considers necessary to discharge its functions on such terms and conditions as it thinks fit.”
(emphasis added).

Whether those provisions permit and indeed empower the respondent to offer employment on a probationary basis is not free from reasonable controversy.

While sections 24(1) and (2) are concerned with the appointment of officers, section 24(8), on the other hand, deals with termination of employment in the following terms:

- “(8) The Commission shall not terminate the employment of an officer unless –*
- (a) it has provided the officer with a complete statement of the reasons why it is contemplated that his employment be terminated;*
 - (b) it has given the officer a full and fair opportunity to show cause why his employment should not be terminated;*
 - (c) it has, within 7 days of the date on which a hearing held under paragraph (b) is completed, referred the matter to the Corruption Advisory Committee for its advice; and*

(d) *the termination of the employment of the officer is effected within 7 days from the date on which the matter was referred to the Corruption Advisory Committee under paragraph (c)."*

The respondent is relying on the deemed additional contractual term contained in the second letter dated 16 May 2003 whereby a probationary period of one year, as further described in the "Notes & Instructions" form, is being introduced to invoke that section 24(8) of the POCA does not apply to applicant.

The short answer is that it remains a moot point whether there can be a contractual derogation of section 24(8) or whether any contractual term devised by the respondent *vis-à-vis* its officers must also not fall foul of the provisions of the POCA. We observe that nowhere in the POCA is it mentioned that its section 24(8) should apply to its confirmed officers only, but not to those on probation. And, it has not been claimed that a literal interpretation of section 24(8) which would make it applicable to all officers, inclusive of those on probation, would overburden the proper functioning of the respondent. This is the more pertinent when we consider the status of the respondent and the general framework in which it is called upon to combat corruption which must start with a strict respect of the rights of its own officers as guaranteed by its constitutive legislation.

But we need not, at this stage, pronounce ourselves on the merits of the application save that we are satisfied that the applicant has raised a justiciable issue to be tried.

We must finally consider the applicant's claim that, because, his appointment needs prior consultation with the Prime Minister, pursuant to section 9 of the POCA, his eventual dismissal must equally follow the same preliminary process. We again find that the point raised is again worthy for canvassing on the merits.

